

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-100700
		TRIAL NO. B-0904410
Plaintiff-Appellee,	:	
		<i>JUDGMENT ENTRY.</i>
vs.	:	
FONTA WHIPPLE,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See S.Ct.R.Rep.Op. 3(A); App.R. 11.1(E); Loc.R. 11.1.

Defendant-appellant Fonta Whipple was charged with attempted murder, two counts of felonious assault, and two counts of having a weapon while under a disability. The attempted murder and felonious assault charges each carried firearm specifications. After a jury was empanelled, but before opening statements had occurred, the trial court declared a mistrial based on “manifest necessity” because the state’s key witness refused to testify. Whipple was later tried by another jury. He was found guilty as charged. The trial court merged several of these counts and sentenced Whipple to a total of eighteen years’ incarceration. Whipple now appeals.

In his first assignment of error, Whipple claims that the trial court erred in denying a motion to suppress statements that he made to police. He argues that the police violated his Sixth Amendment rights because they had questioned him, alone, when he was represented by counsel and after he had invoked his right to counsel. But the

interrogating officers testified that Whipple had not invoked his right to counsel, that he was read his Miranda rights and that, after being read his rights, he had agreed to speak with the officers. This assignment of error is overruled on the authority of *Montejo v. Louisiana* (2009), 556 U.S. 778, 129 S.Ct. 2079; see, also, *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8.

In his second assignment of error, Whipple argues the trial court erred in determining that a “manifest necessity” warranting a mistrial had occurred. Therefore, he contends, his Fifth Amendment right to be free from double jeopardy was violated when he was subjected to a second trial. This argument has no merit.

Retrial is not barred where a trial court declares a mistrial based on “manifest necessity.” *State v. Glover* (1988), 35 Ohio St.3d. 18, 19, 517 N.E.2d 900. We afford great deference to the trial court’s determination in this regard. *Id.* When reviewing the trial court’s decision, we must balance the defendant’s right to have the charges decided by a particular tribunal against society’s interest in a fair trial and the efficient dispatch of justice. *State v. Calhoun* (1985), 18 Ohio St.3d 373, 376, 481 N.E.2d 624; see, also, *Arizona v. Washington* (1978), 434 U.S. 497, 98 S.Ct. 824.

In this case, the trial court declared a mistrial after the state’s key witness, Ashlee King, refused to testify out of fear of retaliation, even after the court granted her immunity and after she was jailed for contempt of court for refusing to testify. Before doing so, the court conducted a hearing and considered several options. The mistrial was declared early in the case, before any evidence was presented.

Under these circumstances, we hold that the trial court did not err. See *State v. Lanier*, 7th Dist. No. 06 MA 94, 2007-Ohio-3172. Whipple’s second assignment of error is overruled.

In his third assignment of error, Whipple claims that his convictions are not supported by sufficient evidence and are also against the weight of the evidence. Upon a review of the record, we hold that the state produced sufficient evidence to convict Whipple as charged. See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. And there is no indication that, in weighing the evidence presented, the jury so lost its way as to create a manifest miscarriage of justice. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. We overrule Whipple's third assignment of error.

The trial court's judgment is affirmed.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on November 16, 2011
per order of the Court _____.
Presiding Judge